1963

State of Utah v. Larry Myers : Brief of Appellant

Utah Supreme Court

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A. Pratt Kesler; Attorney for Respondent;

IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

vs.

LARRY MYERS,

Defendant-Appellant.

No. 9937

APPELLANT'S BRIEF

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, *Plaintiff-Respondent,*

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Appeal from the Judgment of the
2nd District Court for Weber County
Hon. John F. Wahlquist, Judge

STATEMENT OF THE KIND OF CASE

This is a prosecution brought by the State of Utah against the defendant, charging him with violation of Section 76-53-15 (1), wherein the defendant was charged with having sexual intercourse with a female under the age of thirteen years of age.

DISPOSITION IN LOWER COURT

The case was tried to a jury. From the verdict of the jury of guilty and the sentence by the court to imprisonment in the Utah State Prison, the defendant appeals.

RELIEF SOUGHT ON APPEAL

Defendant seeks reversal of the judgment and the granting of a new trial.

STATEMENT OF FACTS

The defendant was charged with the crime of rape, under Section 76-53-15, Utah Code Annotated 1953. The defendant was charged with having sexual intercourse on or about the 19th day of October, 1962, in Weber County, State of Utah, with his daughter, Sherry Myers, age ten years. The evidence adduced by the State at the trial consisted of the testimony of the child, Sherry Myers, that on several occasions during the months of September and October of 1962, her father had forced her to engage in acts of sexual intercourse with him. The State further introduced evidence by the testimony of Dr. Homer Rich, a physician, who testified in substance that the girl lacked a hymen and that the sexual parts were irritated and that in his opinion she could have been penetrated, although he did not indicate in his opinion whether or not she had had sexual intercourse or not.

The defendant produced evidence to show, in addition

to the denial of the defendant of any wrong doing, that shortly before the alleged rape the child had received a severe kick in the area of her sexual parts by a brother of the child, and that she had been subjected to the influence and pressure of relatives of the defendant to secure her leaving the home of the defendant and living elsewhere.

ARGUMENT

POINT I.

THAT THE COURT, IN EXCLUDING ALL WITNESSES, INCLUDING THE RELATIVES OF THE DEFENDANT, DENIED THE DEFENDANT A PUBLIC TRIAL.

Begnning on page 22 of the transcript in this matter, the following remarks were made:

> THE COURT: You may make your opening statement.
>
> MR. NEWEY: If it please, Your Honor, at this time by reason of the age of Sherry Myers, our proof will show that she is 10 years of age. By reason of the nature of this crime, being that of rape by reason of the relationship between the girl and her father, we would move to exclude the public from the courtroom at all times during this trial, including any persons.
>
> MR. BINGHAM: Your Honor, may I approach the bench before you rule on it. I would like to make a suggestion.
>
> Your Honor, could this be handled in the absence of the jury?

THE COURT: Under the constitution the motion is denied with the exception of all who may be witnesses. All persons who are interviewed as possible witnesses are to leave.

MR. BINGHAM: Your Honor, may I make something a matter of record at this time?

THE COURT: Yes.

All persons who have been interviewed as possible witnesses, find a place for them.

BAILIFF: Anybody that is going to be a witness, please step out.

THE COURT: You may keep one officer with you if you want.

MR. BINGHAM: Your Honor, may I make this motion at this time?

THE COURT: Come forward to the bench.

MR. BINGHAM: Your Honor, may the record show that I approached the bench, and at this time I indicated that I wanted to make a proffer to the record as to the reasons for objecting to the court's order, and that the court at this time indicated that the objection would have to be made later?

THE COURT: Yes. The trial is to be open to the public with the exception of the witnesses. They may be called back when their presence is necessary for the testimony of the proceedings.

MR. BINGHAM: May the record further show, Your Honor, that this is not the motion of the State, no motion for this order was made?

THE COURT: The motion is by the State only.

MR. BINGHAM: The State didn't make this motion, Your Honor.

MR. NEWEY: Our original motion, Your Honor, was to exclude all persons from the courtroom, and you denied that, I or assume you denied that.

THE COURT: To the extent only. I will grant it only as to the witnesses. If you want that, you can have that. If you don't want it, they can come back.

MR. NEWEY: We do desire that, Your Honor.

THE COURT: All right, you may proceed.

Article 1, Section 12, of the Utah State Constitution provides, as follows:

> "In criminal prosecutions, the accused shall have the right to appear and defend in person and by counsel, . . . to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases."

Title 78-7-4, Utah Code Annotated, 1953, is a statute which states the following:

> "Right to exclude in certain cases — In an action of divorce, criminal conversation, seduction, or abortion, rape, or assault with intent to commit rape, the court may, in its discretion, exclude all persons who are not directly interested therein, except jurors, witnesses, and officers of the court; and in any cause the court may, in its discretion, during the examination of a witness exclude any and all other witnesses in the cause."

It should be noted at the beginning that the motion by the State for the exclusion of all of the public was made on the basis of the nature of this case. It was stated to the court that the motion was based on the age of the girl, age 10 years, the relationship of the girl and her father, and the fact that it was a rape case. There was no motion to

exclude witnesses until they had testified, nor was there a motion made to exclude people from the courtroom based upon any embarrassment of the young girl in the case.

The key people who were excluded by the order of the court, as the roster of witnesses in the transcript shows, were in fact the mother of the defendant, the grandmother of the defendant, and other friends and relatives of the defendant.

In State v. Jordan, 57 Utah 612, 196 P. 565, which was a statutory rape trial, the court excluded all of the public with the exception of witnesses. The court held that the defendant had been denied a public trial within the purview of our constitution and stated the following:

> "We cannot conceive of a case, no matter how revolting and disgusting the details of the testimony given, in which the near relatives and friends of the accused should not be permitted to be in attendance upon the trial for the purpose of seeing that the accused is fairly and justly dealt with by the officers of the court and not improperly condemned."

In State v. Beckstead, 96 Utah 528, 88 P.2d 461, which was a carnal knowledge case, the State made a motion to exclude the spectators from the courtroom. Objection was made and over the objection the court made an order to clear the courtroom with the exception of all witnesses. The court in the Beckstead case discussed the implications of Title 78-7-4, Utah Code Annotated, 1953, and stated as follows:

> "It will be observed that the part of this later section, just quoted down to the semicolon following the word court, must relate to civil actions. All of them except 'divorce' are actions in tort for which recovery of damages may be had and cannot refer to criminal prosecutions without conflicting with the constitution. That part of the section following the semicolon, relating to 'any cause' but in the discretion of the court 'any cause' relates only to the exclusion of 'any and all other witnesses in the cause' and only during the examination of a witness. This is what we think was intended by the legislature and avoids any constitutional conflict."

In the case of re: Oliver, 333 U.S. 272, 92 L. E. 693, 68 Supreme Court Reports 507, the court in citing State v. Beckstead indicated with approval that it was error to exclude friends and relatives of the accused from the trial as was done in the instant case.

Likewise in People v. Byrnes, 192 P.2d 290, a California case, the defendant was charged with rape and sexual perversion and was denied a public trial as guaranteed by the Constitution where the sheriff was ordered to admit to the courtroom only defendant's counsel, officers of the court, jurors, and those having business with the court, and excluding others and all witnesses except while on the witness stand.

In the Byrnes case, the deputy district attorney, as in the instant case, moved that the matter be heard behind closed doors, which was objected to by the defendant. The court went on to state with approval a rule as stated in People v. Hardman, 37 P. 153, as follows:

> "The doors of the courtroom are expected to be kept open, the public are entitled to be admitted. The trial is to be public in all respects, as we have before suggested, with due regard to the sizes of the courtroom, the conveniences of the court, the right to exclude objectionable characters and the youth of tender years, and to do other things that may facilitate the proper conduct of the trial."

There appears to be two lines of cases in connection with the question of whether the defendant must show that actual prejudice resulted from the exclusion by the court of a part or all of the public. In State v. Jordan, 57 Utah 612, 186 P. 565, the court stated the majority rule that the defendant having been denied a public trial within the scope of our Constitution, the law presumes that the act of the court was prejudicial. Again in State v. Beckstead our Supreme Court has stated:

> "The error complained of in the exclusion order may seem technical. It is, however, fundamental. We are of the opinion that the order excluding all spectators including friends and relatives of the defendant was error. The Constitution of this State, Section 12, Article 1, provides, among other things, that in criminal prosecutions that you shall have the right to a speedy, public trial."

In People v. Byrnes the court again discussed the question of actual prejudice and stated the majority rule as follows:

> "Appellant has not attempted to prove any actual prejudice resulted from the exclusion of the public. The record shows no reason for the order, other than the one stated by the court."

The court went on in this case to state that there was no actual threat of disturbance or disturbance of the proceedings of the trial, and that there appeared to be no necessity for the exclusion order, and there being none the order of the court was a clear deprivation of the defendant's right to a public trial.

In the instant case, the court later modified its order, upon the withdrawal by the State of its motion, and allowed everyone to return to the courtroom.

In State v. Beckstead a similar occurrance took place and our Supreme Court stated as follows:

> "The fact that the order was later modified by advising relatives that they might return and the further fact that some of them did return could not affect the consequences of the error. The original order was carried out during a portion of the trial."

In State v. Hone, 224 P.2d 500, a Wyoming case, the court excluded spectators at the request of the jury in a rape case. To this the defendant objected. The court went on to state that if the defendant had any special friends that he wanted to have stay with him, that they would be allowed to remain, but that the public would be excluded. The court, in discussing a defendant's rights to a public trial, stated with approval the rule from Cooley's Constitutional Limitations 8th (8th ed.) page 647, as follows:

> "The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned,

> and that the presence of spectators may keep his triers, keenly alive to a sense of their responsibility and to the importance of their function; and the requirement is fairly observed if, without partiality or favoritism, a reasonable proportion of the public is suffered to attend, notwithstanding that those persons whose presence could be of no service to the accused, and who would be drawn thither by a prurient curiosity or excluded altogether."

The court, in the Hone case, went on to state that it felt there were enough people who were allowed to remain in the courtroom to afford to the defendant a fair and public trial. In all of the cases wherein the matter was discussed, the courts have taken special interest in, and have been greatly concerned that the defendant be allowed to retain in the courtroom, friends and relatives. As was stated in State v. Smith, a Utah case, 67 P.2d 110, a statutory rape case, the court stated:

> "It is reasonably clear from the language used that relatives and friends were not intended to be excluded from the courtroom and there is no complaint that any such persons were in fact excluded."

The defendant contends that he was denied a fair trial in connection with the manner in which the motion for an order to exclude the public from the trial was brought to the attention of the court. The motion was made by the State of Utah, in the presence of the jury, and the defendant, upon objecting thereto, and desiring to discuss the matter in the absence of the jury, was denied his request. (See quoted portions of the transcript as set forth above.)

That the State's motion, requiring the defendant to argue his desire for a public trial, in the presence of the jury, in view of the nature of the case and the relationship of the defendant and the prosecuting witness, could not but have placed the defendant in an unfavorable and prejudicial light in the eyes of the jury.

POINT II

THAT THE COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR A MISTRIAL BASED UPON DETECTIVE TIM DYER'S TESTIMONY ON CROSS EXAMINATION.

During the opening statement of the district attorney, the following statement was made at page 29 of the transcript:

> "We will call Officer Dyer who will briefly tell you that when this defendant was charged with the crime of rape and was advised that he was charged with the crime of rape, that instead of the defendant turning and denying it as a father would . . ."

That during the cross examination of the said Tim Dyer by defendant's attorney, the following testimony was given at page 96:

> Q Were you present here in court when Mr. Newey gave his opening statement to the jury?
>
> A No. I was barred from the courtroom.
>
> Q I see. Now, is it true that Mr. Myers didn't deny the charge of rape?
>
> A What was this again?

Q Did Mr. Myers deny to you that he was guilty of rape; yes or no?

A I don't get your question. Would you repeat it again?

Q When a man is arrested and charged with a crime, the officer asks him if he is guilty of this thing. You do this, don't you?

A On this case or other cases?

Q On any case, when you arrest a man of a crime, you ask him if he is guilty or innocent, don't you? Did you do it or didn't you?

A No. We don't ask a fellow if he is guilty or innocent, no.

Q Do you mean to tell me if I got arrested for a charge like this you wouldn't ask me if I did it?

A I didn't ask him if he did it.

Q Is it your testimony under oath that you didn't ask Larry Myers if he committed this offense or not?

A That's right. I didn't ask him that.

Q Is it your testimony that that is standard police procedure not to ask an accused person if he did the offense that he is charged with?

A Now, state that question again, please. I don't get what the question is.

Q Is it my understanding that it is standard police procedure when you arrest a person not to ask him whether he has done the offense that he is charged with?

A It all depends on whether you have other cases with this person or not. We know him pretty well.

Later in the cross examination he was asked, page 96, if he knew of any offense that Mr. Myers was guilty of. His answer was, as indicated by the record, "no response." On page 197 of the transcript, the court, in denying the motion for a mistrial, indicated that the answers given by the officer were fairly made in response to the questions asked.

In a sex offense, particularly one in which a father is accused of having sexual intercourse with his ten year old child, the remarks of a police officer in answer to questions that imply the defendant is a man "It all depends on whether you have other cases with this person or not. We know him pretty well," can easily paint a picture in the minds of a juror that here is a defendant who has a police record of sex offenses or at least of other offenses. Especially in view of the fact, when challenged specifically, Officer Dyer could state no crime of any nature this man was guilty of. If this were not a sex offense of the particular type described, the prejudice arising may be slight; but in this particular instance, and in the context in which the answer was given, the results could not but have prejudiced the defendant in the minds of the jurors who heard the answer given. The testimony quoted above indicates clearly an attempt by the officer to support the district attorney's opening remarks, and to evade stating the truth. That the defendant had, as admitted later in the testimony of the officer, denied his guilt strongly.

It should be noted that immediately after the testimony complained of above, the defendant's attorney requested that the jury be excused and a matter discussed

in its absence. This motion was denied by the court, as recorded on the bottom of page 97. The purpose in making the motion, was to attempt to correct or remove, immediately, and not in the presence of the jury, the prejudice that the defendant contends the remarks caused.

POINT III

THAT THE COURT ERRED IN REMARKS MADE DURING THE TRIAL, IN THE PRESENCE OF THE JURY, THAT AMOUNTED TO A PREJUDICIAL COMMENT UPON THE EVIDENCE BY THE COURT.

The transcript will indicate it was the contention of the defendant during the trial that the accusation made by his daughter was based upon the influence of other relatives who desire to secure custody of the girl. The transcript will further indicate that the person alleged by the defendant to be primarily responsible for the girl making the accusation was one Freda, sworn Aunt Freda. At page 75 of the transcript, upon cross examination of the complaintant, Sherry Myers, the following testimony was given:

> Q (By attorney for defendant.) In fact, before you answer my questions, you look at Freda, don't you?
>
> A Yes.
>
> Q Why?
>
> A I don't know.
>
> THE COURT: The record may show that counsel stands between Aunt Freda and the witness.

Q May the record show that I asked her if she was looking at Aunt Freda?

THE COURT: Yes.

During the cross examination of the defendant's mother, Mary Heath, the district attorney asked permission to approach the bench and after a bench conference, the court made the following statement to the jury, without solicitation by either side, as revealed on page 135 of the transcript.

THE COURT: The record may show there has been an injection which might tend to bear upon this woman's mental capacity and the court has ruled that you may ask. You may proceed.

The district attorney was then allowed to ask the witness if she suffered from hallucinations, and to go into detail upon cross examination as to her psychiatric treatments, and hospitalizations, etc.

The contention of the defendant that Aunt Freda had encouraged the child to make accusations against her father was primarily substantiated by the testimony of Mary Heath. The court's comment that question of her mental capacity had been raised and that the State could go into the matter, was a comment upon the weight that the jury should give to this witness' testimony, which only the finder of fact should make.

POINT IV

THAT THE ERRORS OF THE COURT ARE CUMULATIVE, AND WHEN VIEWED IN CONNECTION WITH EACH OTHER, RESULTED IN PREJUDICE TO THIS DEFENDANT.

Aside from the contention that the defendant was denied a public trial by the court's excluding from the courtroom witnesses during a portion of the trial, there remains the other points heretofore argued. The refusal of the court to grant a mistrial based upon the testimony of Officer Dyer, and the remarks of the court commenting upon the evidence offered by the defendant's mother, Mary Heath.

The picture which was painted by the State, through remarks made, and orders entered, by the court, was to suggest to the jury that the defendant was the son of an emotionally and mentally ill person, had an extensive police record, and was well known to the police department. The fact that the Officer admitted he knew of no crimes the defendant was guilty of could not lessen, but slightly, the impact of his testimony.

The court has often stated that the charge of rape is one that is easily made and is hard to disprove. In this case the father is accused of raping his ten year old daughter. The accusation alone imparts a prejudice to a defendant. The sentence to be meted out by our statute of from twenty years to life indicates the gravity of the charge.

Casual remarks by the court, or from a prosecution witness, may in other cases impart little damage. In this case, however, the remarks complained of are such, it is respectfully submitted, that could not help but stoke the fires of prejudice and revulsion that the very nature of the charge ignite in most jurors' minds.

CONCLUSION

That the conviction of this defendant should be reversed in that he was deprived of a fair, orderly, public trial. That improper evidence was received and that said evidence and the remarks of the court prejudiced the defendant in the eyes of the jury.

Respectfully submitted,

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